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No. 91-217

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

WASHINGTON DEPARTMENT OF NATURAL RESOURCES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly construed the law of the State of Washington concerning the location of the ordinary high water mark of a river.

2. Whether state law concerning the location of the ordinary high water mark is the same as federal law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Austin v. *Bellingham*, 69 Wash. 677, 126 P. 59 (1912)	3, 4, 5, 6, 7, 8
Borough of Ford City v. *United States*, 345 F.2d 645 (3d Cir.), cert. denied, 382 U.S. 902 (1965)	10
Houston v. *Hill*, 482 U.S. 451 (1987)	9
Howard v. *Ingersoll*, 54 U.S. (13 How.) 381 (1851)	3, 4, 9
Public Utility Dist. No. 1 & State of Washington, Dep't of Natural Resources v. *Tombari Family Limited Partnership of Washington*, No. 85-2-00128-8 (Sup. Ct. Pend Oreille County May 24, 1990)	8
United States v. *Claridge*, 416 F.2d 932 (9th Cir. (1969)), cert. denied, 397 U.S. 961 (1970)	10
United States v. *Harrell*, 926 F.2d 1036 (11th Cir. 1991)	10

Constitution:

Wash. Const. Art. XVII	6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-60a) is reported at 926 F.2d 1502. The opinion of the district court (Pet. App. 149a-173a) is reported at 585 F. Supp. 606.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1991, and a timely petition for rehearing was denied on May 8, 1991. The petition for a writ of certiorari was filed on August 6, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arose as an action in trespass brought by the United States on behalf of the Kalispel Indian Tribe and individual Indian allottees against petitioner Pend Oreille County Public Utility District No. 1 (PUD). The PUD operates the Box Canyon Dam on the Pend Oreille River, which forms the western boundary of the Kalispel Indian Reservation in the State of Washington. Before the dam was constructed, the water level on the river as it passed the Reservation reached approximately 2041 feet above mean sea level (msl) during the spring, receded to 2022 feet by late summer, and remained at the latter level until the following spring. Because of the dam, some portions of the parcels at issue that previously had been flooded only in the spring now remain submerged throughout the year. Pet. App. 152a-156a.

The district court found as a factual matter that the Indians previously had used areas down to 2028 msl for grazing and food gathering and that there was edible grass along the river down to that elevation prior to construction of the dam in 1955. Pet. App. 159a, 172a. It further found that although operation of the dam does not affect the surface elevation of the river in the peak flow season, which lasts approximately 2 months each year, it significantly affects the surface elevation below 2035 msl during the remaining months of the year. *Id.* at 156a, 165a. Finally, the district court found that flowage easements obtained by the PUD from certain individual Indian allottees in 1955 and the late 1960s evidenced the PUD's knowledge that landowners along the river were using the land above 2028 msl for cattle grazing purposes. *Id.* at 167a-170a.

On the basis of the foregoing factual findings, the district court held that operation of the dam resulted

in the submerging of certain lands along the river that were not part of its bed, but instead were above the ordinary high water mark (except for the levels attained during the spring floods). The court first concluded that the location of the ordinary high water mark in this case is governed by the law of the State of Washington, as set forth in *Austin* v. *Bellingham*, 69 Wash. 677, 126 P. 59 (1912). Pet. App. 171a-173a. Applying the *Austin* formulation, the court then found that the lands used by the Indians between 2028 and 2034 msl constitute " 'meadow land adjacent to the river, which, when the waters leave it, is adapted to and can be used for grazing or pasturing purposes.' " *Id.* at 172a-173a (quoting 69 Wash. at 681, 126 P. at 61). The court therefore held that the PUD is liable in damages for trespass upon those lands. *Id.* at 173a.

2. The court of appeals affirmed the district court's judgment that the PUD is liable in trespass. Pet. App. 26a-35a. The court of appeals did not reach the question whether state law governs the location of the ordinary high water line, because it concluded that the applicable rule is the same under state law (as set forth in *Austin* v. *Bellingham*) and federal law (as set forth in *Howard* v. *Ingersoll*, 54 U.S. (13 How.) 381, 415-416 (1851), and subsequent lower court decisions). Both, it reasoned, locate the ordinary high water line (and therefore the limit of the riverbed owned by the State) as the line below which water precludes the growth of useful land vegetation—a line that "corresponds with the highest level normally reached by the river each year, but excluding the annual spring rise." Pet. App. 28a; see *id.* at 28a-32a. The court of appeals also affirmed

the district court's factual findings in applying that test. *Id.* at 32a-35a.[1]

ARGUMENT

The court of appeals correctly sustained the district court's determination of the ordinary high water line of the Pend Oreille River within the Pend Oreille Indian Reservation. That decision does not conflict with any decision of this Court, the Washington Supreme Court, or any other federal court of appeals. To the contrary, the court below applied the legal standard announced by this Court in *Howard* v. *Ingersoll*, 54 U.S. (13 How.) 381, 415-416 (1851), and by the Washington Supreme Court in *Austin* v. *Bellingham*, 69 Wash. 677, 126 P. 59 (1912). Further review therefore is not warranted.

1. a. Petitioners contend (Pet. 37-39) that state law controls the location of the ordinary high water line of the Pend Oreille River within the Reservation, and they concede (Pet. 34) that "[t]he only decision of the Supreme Court of the State of Washington which deals in any significant way with a description of the line of ordinary high water on fresh water is found in *Austin* v. *Bellingham*, *supra*." But that submission serves only to demonstrate that certiorari should be denied. The district court in fact *agreed*

[1] The question of the amount of damages is the subject of separate proceedings in the Ninth Circuit, Pet. App. 25a & n.1, and is not at issue here. On the instant appeal, the court of appeals also rejected the Tribe's claim (which was not endorsed by the United States) that the Tribe owns the bed of the Pend Oreille River within the Reservation, *id.* at 35a-56a, and remanded the Tribe's challenge to the district court's denial of its motion to amend its complaint in intervention to assert a reserved water right claim, *id.* at 56a-60a. Those rulings are not at issue here.

with petitioners that state law controls; it accordingly applied the reasoning of *Austin* v. *Bellingham*, holding (based on various factual findings) that the ordinary high water line of the river is at 2028 msl. The court of appeals in turn agreed with the district court that *Austin* v. *Bellingham* announces the proper legal standard, which it found to be identical to the applicable standard under federal law as well. The court of appeals also affirmed the district court's factual findings, and petitioners do not challenge those findings here or suggest that the courts below misapplied the rule of *Austin* v. *Bellingham*. For this reason, even if we assume that a court of appeals' application of state law might, in an appropriate case, present a question of sufficient importance to warrant review by this Court, this case does not remotely present such an occasion.

b. Petitioners suggest (Pet. 34-35) that a more appropriate rule would be to measure the ordinary high water line by the average level a river attains during the annual spring flood. The rule petitioners prefer was expressly rejected in *Austin* v. *Bellingham* itself. There, the plaintiff landowner sought to prevent the City of Bellingham from operating a dam at the outlet of Lake Whatcom, a navigable waterway. The city was acting pursuant to its statutory authority, conferred by the State, "to occupy and use the beds and shores up to the high water mark of any such water course or lakes." 69 Wash. at 680, 126 P. at 61. The plaintiff asserted that "prior to the installation of the dam, lands that are now flooded or saturated had, during the summer months, been cultivated or pastured." 69 Wash. at 679, 126 P. at 60.

The Washington Supreme Court held that the city was entitled to raise the water level only to the line of

ordinary high water, defined as follows (69 Wash. at 681, 126 P. at 61 (emphasis added)):

> High-water mark does not mean the height reached by unusual floods; for these usually soon disappear. *Neither does it mean the line ordinarily reached by the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes; nor yet does it mean meadow land adjacent to the river, which, when the waters leave it, is adapted to and can be used for grazing or pasturing purposes.* The line, then, which fixes the high-water mark is that which separates what properly belongs to the river bed from that which belongs to the riparian owner; that is, the owner of adjoining land. Soil which is submerged so long or so frequently, in ordinary seasons, that vegetation will not grow on it may be regarded as a part of the bed of the river which overflows it.

In other words, the line "ordinarily" reached in the spring is not determinative of the boundary between the beds and shores of a waterway, as petitioners maintain.

Petitioners insist (Pet. 24, 26, 33, 36) that *Austin* v. *Bellingham* did not actually adopt the above-quoted rule—that it is mere dictum—and that in any event the Washington Supreme Court has not construed the language in Article XVII of the Washington Constitution that establishes the State's ownership of lands underlying navigable waterways up to the line of ordinary high water. See Pet. App. 1a. There is no basis for the assertion that the extended discussion quoted above was dictum; it was necessary to the court's ruling. Moreover, petitioners' contention regarding the possible meaning of the phrase "line of ordinary high water" in the state constitution over-

looks that *Austin* v. *Bellingham* specifically addressed the meaning of that phrase, and petitioners have offered no support for the notion that the Washington Supreme Court would apply some other standard in construing the identical phrase in the state constitution. In fact, *Austin* v. *Bellingham* rejected the contention that the State (and the city as its grantee) had rights—presumably deriving from the state constitution—to the extent petitioners claim here (69 Wash. at 681, 126 P. at 61):

> Nor can it be successfully contended that the state could, by the statute cited, grant some right that it did not possess. Its rights are limited to the line of ordinary high water, and not to the line of the highest water that may be proved.

For these reasons, the court of appeals correctly relied on *Austin* v. *Bellingham* as an authoritative expression of state law regarding the location of the ordinary high water mark here.

2. Petitioners argue (Pet. 31-37), however, that although there is no *current* basis for contending that the Ninth Circuit erred as a matter of state law or that its decision conflicts with any decision of the Washington Supreme Court on the subject, there "may" be such a conflict in the future if the Supreme Court of Washington should overrule *Austin* v. *Bellingham*. They point (Pet. 22-25) to a suit brought by the PUD in state superior court against certain non-Indian owners of land within the Reservation, seeking a declaration that the ordinary high water line of the Pend Oreille River under state law would be the highest level the river attained during the annual spring flood (2041 msl). The superior court granted judgment for the defendants in that case on the ground that under the doctrine of collateral es-

toppel, the federal district court's judgment in the instant case barred petitioners from relitigating the location of the ordinary high water line. *Public Utility Dist. No. 1 & State of Washington, Dep't of Natural Resources* v. *Tombari Family Limited Partnership of Washington*, No. 85-2-00128-8 (Sup. Ct. Pend Oreille County May 24, 1990). Petitioners have appealed that ruling to the Washington Supreme Court, which heard oral argument on May 28, 1991, but has not yet rendered a decision. Petitioners request the Court to grant certiorari here in order to keep the instant case alive pending a decision by the Washington Supreme Court in the state-court litigation. That request should be denied.

In the first place, because the state superior court disposed of the state-court litigation on collateral estoppel grounds, the Washington Supreme Court may do the same, without addressing the merits. Moreover, if the Washington Supreme Court should reach the merits, there is no reason to suppose that it will overrule the almost 80-year-old decision in *Austin* v. *Bellingham*, especially since it affects property rights. In any event, although the Washington Supreme Court is free to overrule *Austin* v. *Bellingham* (unless that action would impermissibly interfere with vested property rights), the relevant question before the court of appeals was what the law of Washington was at the time it rendered its decision. The court of appeals plainly did not err in its resolution of that question, since petitioners do not and cannot deny that *Austin* v. *Bellingham* represented the most authoritative expression of state law at the time the court of appeals ruled. Nor, contrary to petitioners' assertions (Pet. 25, 28-31), is the conditional grant of certiorari they urge warranted on the ground that

the decision below is of broad importance; the court of appeals' judgment affects only the portions of the particular tracts at issue on the Reservation that lie between 2028 msl and 2041 msl. The Washington Supreme Court will not be bound by the judgment below in its resolution of this question of state law as a general matter.[2]

3. Petitioners erroneously (and inconsistently) assert (Pet. 37) that the court of appeals concluded that federal law controls the question of the location of the ordinary high water line. In fact, the court below specifically declined to decide which law controls, because it determined that state and federal law are identical on the subject. Pet. App. 28a-32a.

Moreover, petitioners' argument (Pet. 39) that *Howard* v. *Ingersoll*, 54 U.S. (13 How.) 381 (1851), does not furnish the federal rule of decision regarding the boundary between the bed and shores of navigable waterways is incorrect. In construing the cession agreement at issue in *Howard* v. *Ingersoll*, the Court announced principles that are fully consistent with subsequent federal decisions on the ques-

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[2] The court of appeals denied petitioners' motions to certify the issue to the Washington Supreme Court and to stay proceedings pending a final ruling in the separate state court action, observing that even if *Austin* v. *Bellingham* did not provide definitive law on the subject, it furnished clear evidence of how the Washington Supreme Court would decide the issue. Pet. App. 31a. Petitioners do not appear to challenge the court of appeals' rulings on these issues. See Pet. i. In any event, those rulings were correct. "It would be manifestly inappropriate to certify a question in a case where, as here, there is no uncertain question of state law whose resolution might affect the pending federal claim." *Houston* v. *Hill*, 482 U.S. 451, 471 (1987). It is not the role of the federal courts to invite revisions of established state law. *Ibid.*

tion. See, *e.g.*, *United States* v. *Harrell*, 926 F.2d 1036, 1041-1043 (11th Cir. 1991); *United States* v. *Claridge*, 416 F.2d 933 (9th Cir. 1969), cert. denied, 397 U.S. 961 (1970); *Borough of Ford City* v. *United States*, 345 F.2d 645 (3d Cir.), cert. denied, 382 U.S. 902 (1965). The court of appeals therefore was correct in concluding that federal law is consistent with the principles of state law announced in *Austin* v. *Bellingham*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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